REVITALIZING THE INFANCY DEFENSE IN THE CONTEMPORARY JUVENILE COURT

Barbara Kaban[*] *& James Orlando*[**]

I. INTRODUCTION

As we begin the twenty-first century, fundamental questions about children's mental capacities and legal culpability are once again being addressed. Issues surrounding the legal culpability of children for criminal acts have taken on heightened significance, as many states have shifted the focus of their juvenile justice systems from treatment and rehabilitation to punishment of juvenile offenders.[1] Even very young children sometimes face waiver into adult criminal court or juvenile delinquency determinations, which more closely resemble criminal sanctions rather than treatment.[2] American jurisprudence has long held that punishment should be based not only on the harm caused, but also on the blameworthiness of the offender.[3] Current concern about the relationship between blameworthiness and immaturity has historic roots in common law.

Over the course of centuries, a rule of law emerged that a child who lacked the capacity to understand the wrongfulness of his conduct could not be held criminally culpable.[4] The principle was memorialized as the common law doctrine of infancy.[5] Children

---

* Deputy Director and Director of Research and Policy, Children's Law Center of Massachusetts. J.D., Boston College Law School; M.B.A., Boston University; M.Ed., Harvard University.

** J.D. Candidate, Harvard Law School, 2008.

1. *See infra* Part IV.C.

2. *See* Andrew M. Carter, *Age Matters: The Case for a Constitutionalized Infancy Defense*, 54 U. KAN. L. REV. 687, 687-92 (2006) (discussing recent cases involving children convicted of serious crimes).

3. *See* California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) ("[P]unishment should be directly related to the personal culpability of the criminal defendant."); WILLIAM BLACKSTONE, 4 COMMENTARIES *20-21. This principle is sometimes referred to as the principle of penal proportionality. *See* Mary Berkheiser, *Capitalizing Adolescence: Juvenile Offenders on Death Row*, 59 U. MIAMI L. REV. 135, 181-82 (2005).

4. *See* WAYNE R. LAFAVE, CRIMINAL LAW § 9.6(a) (4th ed. 2003) [hereinafter LAFAVE, CRIMINAL LAW].

5. *Id.*

under age seven were conclusively presumed to be incapable of committing any crime; children fourteen and older were treated as fully responsible adults; and children between the ages of seven and fourteen were presumed incapable of committing any crime, but the presumption was rebuttable.[6] The prosecution bore the burden of overcoming the presumption of incapacity by showing that the child understood the nature and wrongfulness of his act.[7]

The common law age distinctions are now supported by a growing body of empirical research documenting that children between the ages of seven and fourteen lack the cognitive abilities possessed by adults to reason, exercise judgment, and control impulses.[8] Such cognitive deficits do not arise out of a specific disability, but rather reflect the fact that young children have not yet attained the requisite capacities assumed in the fully responsible adult.[9]

American jurisprudence has long recognized that there are important differences between children and adults, which must be accommodated when determining legal liability. Examples of age-based distinctions designed to protect the average child from his developmental immaturity and ignorance of the law abound in civil and criminal proceedings.[10] Yet many states, relying on the supposedly noncriminal nature and remedial purposes of delinquency proceedings, reject the applicability of the infancy defense in contemporary juvenile court proceedings.

In *Gault,* the Supreme Court dismissed arguments based on so-called "non-punitive" treatment and "civil" labels of convenience to justify denying children fundamental rights in delinquency proceedings.[11] The Court recognized that a finding of delinquency unmistakably connotes blameworthiness and subjects a child to

---

6. *See* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 9.6(a) (2d ed. 2003) [hereinafter LAFAVE, SUBSTANTIVE CRIMINAL LAW]; Allen v. United States, 150 U.S. 551, 557-58 (1893).

7. *See* Andrew Walkover, *The Infancy Defense in the New Juvenile Court,* 31 UCLA L. REV. 503, 511 (1984).

8. *See infra* Part IV.D.

9. *See infra* Part III.D. *See also* Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth,* 81 TEX. L. REV. 799, 829 (2003) (contending that the cognitive decision making of preadolescents differs from adults in so fundamental a manner as to justify only rehabilitative interventions, rather than punitive measures, in the lives of young children charged with criminal or delinquent acts).

10. For example, contracts entered into by children are void *ab initio.* Vent v. Osgood, 36 Mass. 572 (19 Pick. 572) (1837). *See also* Scott & Steinberg, *supra* note 9, at 803 (arguing that typical binary age classifications (minor versus adult), which ignore developmental differences between young children and adolescents, suffice in many areas, but juvenile justice policy requires a more nuanced approach).

11. *In re* Gault, 387 U.S. 1, 30 (1967).

punishment.[12] This Article argues that, absent the infancy defense, a delinquency proceeding may produce the unacceptable result of subjecting a child who is not culpable to punishment. Part II describes the historical basis of the infancy defense and its application in early American proceedings. The concept of culpability, as defined in the infancy doctrine, is then compared and contrasted with mens rea and competency. Part III describes the evolution of the juvenile court from its origins in 1899 to the present, highlighting the landmark cases of the 1960s, the punitive legislation that swept the country in the 1990s, and current court decisions that reflect our increased understanding of child development. Part IV compares the decisional law from states that have held the infancy defense applicable or inapplicable in delinquency proceedings. The authors then argue for the revitalization of the infancy defense in contemporary juvenile court proceedings, and conclude that the infancy defense is consistent with the goals of the contemporary juvenile court, reinforces the integrity of the criminal laws, and is essential to ensuring the fundamental fairness of the delinquency proceeding.

II. THE INFANCY DEFENSE AT COMMON LAW

A. *Historic Roots of the Infancy Defense and American Juvenile Courts*

For hundreds of years, society recognized that children think and act differently than adults, and acknowledged the differences in assessments of criminal culpability.[13] Common sense dictated that, while a child may have intended to perform a particular act, this cognitively and emotionally immature person was not necessarily capable of differentiating right from wrong or understanding the consequences of his actions.[14] Therefore, the presumption of incapacity was created to avoid punishing children who, because of their youth, could not grasp the moral ramifications of their behavior, and thus could not be deterred by the threat of punishment.[15]

Various legal systems have acknowledged that children merit special consideration in the criminal law. For example, Roman law long recognized a special status of children charged with crimes. In the second century, Gaius wrote that "most lawyers hold that" only those children approaching puberty, and thus capable of

12. *Id.* at 18-22.

13. *See* LAFAVE, CRIMINAL LAW, *supra* note 4, § 9.6(a).

14. *See* Walkover, *supra* note 7, at 551.

15. *See id.* at 511-12; *In re* Tyvonne, 558 A.2d 661, 664 (Conn. 1989).

understanding right and wrong, could be held liable for theft.[16] As early as the fifth century, Roman law established that children under age seven were *doli incapax*—incapable of malice or criminal intent.[17] Children were not fully accountable for their acts under the criminal law until age fourteen, the presumed age of physical maturity.[18]

By the thirteenth century, the English common law allowed for the pardon of young children convicted of crimes.[19] The rule eventually evolved into a presumption against criminal liability for young children, such that these children would not be subject to trial.[20] By the fourteenth century, it was assumed that children under age seven were without criminal capacity.[21] By the seventeenth century, the upper age limit to which the common law rebuttable presumption applied was fixed at fourteen, establishing that those fourteen and older had the same criminal capacity as adults.[22] Sir Matthew Hale's analysis of the infancy defense in the seventeenth century divided children into four categories: under seven (deemed *doli incapax*), seven to eleven (subject to a rebuttable presumption of incapacity), twelve to fourteen (subject to a weaker presumption of incapacity), and those over fourteen (held criminally responsible for their actions).[23] The middle categories merged by the eighteenth century, creating a rebuttable presumption that children between seven and fourteen lacked the capacity to commit crime.[24] To rebut this presumption, the prosecution typically had to demonstrate conduct of the accused that demonstrated an understanding of the wrongfulness of the alleged criminal act.[25] The common law infancy doctrine was based upon the chronological age of the child at the time of the alleged offense, not the child's mental age.[26]

---

16. *See* Anthony Platt & Bernard L. Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 CAL. L. REV. 1227, 1230 (1966).

17. Frederick Woodbridge, *Physical and Mental Infancy in the Criminal Law*, 87 U. PA. L. REV. 426, 435 (1939).

18. *Id.* at 429.

19. Carter, *supra* note 2, at 708.

20. *Id.*

21. LAFAVE, SUBSTANTIVE CRIMINAL LAW, *supra* note 6, § 9.6(a).

22. *Id.*; Carter, *supra* note 2, at 710.

23. Lara A. Bazelon, Note, *Exploding the Superpredator Myth: Why Infancy Is the Preadolescent's Best Defense in Juvenile Court*, 75 N.Y.U. L. REV. 159, 168-69 (2000).

24. *See* Woodbridge, *supra* note 17, at 434.

25. *See* LAFAVE, SUBSTANTIVE CRIMINAL LAW, *supra* note 6, § 9.6(a) (citing cases in which the prosecution overcame the presumption of criminal incapacity for children under fourteen).

26. *Id.*

The American colonies, and later the American states, adopted the common law infancy defense in its entirety.[27] The rebuttable presumption was considered strongest at age seven, and diminished in strength as the child approached age fourteen.[28] Once reasonable doubt was raised as to whether the child had the capacity to understand the wrongfulness of his conduct, he could not be punished.[29] A small number of states codified the infancy defense in their first penal codes.[30]

In nineteenth-century America, there was no separate juvenile court. All offenders were bound by the same substantive laws and, absent the application of the infancy defense for young offenders, all were punished in a similar fashion.[31] Twentieth-century reformers, horrified by the severe sanctions children received, argued that immature offenders needed treatment, not punishment.[32] Consequently, they spearheaded sweeping changes throughout the nation, which resulted in the formation of juvenile courts.[33]

With the advent of reforms intended to substitute treatment and rehabilitation for punishment of juvenile offenders, the infancy defense fell into disuse.[34] Since children were no longer punished, the blameworthiness of the child was of no consequence and formal processes of fact-finding were unnecessary.[35] However, treatment and rehabilitation in place of punishment was more rhetoric than reality. Functioning free of constitutional inhibitions, juvenile courts evolved into a system characterized by arbitrariness and harsh penalties.[36]

---

27. Carter, *supra* note 2, at 711-14 (discussing early American cases involving the infancy defense). In the nineteenth century, William Blackstone's treatment of children in the criminal law, which included the tiered common law infancy defense, "was, in effect, incorporated into American law." Platt & Diamond, *supra* note 16, at 1238.

28. Walkover, *supra* note 7, at 511 n.22.

29. *See id.* at 507; Sanford J. Fox, *Responsibility in the Juvenile Court*, 11 WM. & MARY L. REV. 659, 660 (1970). See *Godfrey v. State*, 31 Ala. 323 (1858), for an application of this rule.

30. *See* Carter, *supra* note 2, at 714-19. While most states that codified the defense adopted the same age limits as the common law, a few others modified the age limits, lowering the age of presumed criminal capacity. *See id.*

31. *See* Walkover, *supra* note 7, at 513 n.32.

32. *See* Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106-07 (1909).

33. *See* FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE 33 (2005).

34. *See* Fox, *supra* note 29, at 665-72 (summarizing twentieth-century cases involving the applicability of the infancy defense in juvenile courts); Walkover, *supra* note 7, at 512-13.

35. *See* Walkover, *supra* note 7, at 513.

36. *See infra* Part IV.B.

B. *Distinguishing Culpability from Mens Rea and Competency*

A brief word is in order regarding how the infancy defense's presumption against criminal culpability in children relates to the concepts of mens rea and competency.[37] The infancy defense addresses the threshold issue of criminal capacity, much like other excuse defenses, such as insanity or intoxication.[38] The excuse defenses exclude from criminal culpability those who are unable to appreciate the wrongfulness of their acts. Even very young children can, and sometimes do, commit acts that would be considered criminal if committed by an adult. However, the infancy defense shields children from criminal culpability because of their presumed inability to appreciate the seriousness of their acts.[39] Although children may intend to commit a specific harmful or dangerous act, they may not appreciate the consequences or wrongfulness of that act.

Application of the infancy defense to find a child incapable of criminal culpability should not be confused with a finding that a child lacked the requisite mens rea to be held guilty of a criminal offense.[40] Mens rea refers to the mental state that is an element of an offense, "which expresses the intentionality necessary for an act to constitute a crime."[41] Mens rea, like actus reus, is an element of the offense that the prosecution must prove beyond a reasonable doubt.[42] Lack of criminal capacity due to infancy renders the child incapable of conviction for a criminal act as a threshold issue. Thus, discussion of mens rea of a child under seven is moot when the infancy defense applies. For those children seven to fourteen, mens rea only has meaning if the state can overcome the presumption of criminal incapacity. Case law discussing the infancy defense is often not consistent or explicit regarding the standard of proof applied in the determination of whether the prosecution has overcome the rebuttable presumption of incapacity for children aged seven to fourteen.[43] Most courts that have addressed the issue have required

---

37. Another similar concept is criminal responsibility, usually discussed in the context of the insanity defense and the "M'Naghten rule." *See* LAFAVE, SUBSTANTIVE CRIMINAL LAW, *supra* note 6, § 7.2. The rule states that those who, due to mental disease or defect, do not know the nature and quality of an act or did not know that act to be wrong, cannot be subjected to criminal responsibility. *Id.*

38. *Id.* § 9.1(b).

39. *See* Walkover, *supra* note 7, at 509-10.

40. *See id.* at 551 (assessing the distinctions between the infancy defense and mens rea).

41. *In re* G.T., 597 A.2d 638, 640 (Pa. Super. Ct. 1991).

42. *See* LAFAVE, SUBSTANTIVE CRIMINAL LAW, *supra* note 6, § 5.1.

43. *See, e.g.*, State v. Q.D., 685 P.2d 557, 561 (Wash. 1984).

either proof beyond a reasonable doubt or clear and convincing evidence to rebut the presumption of incapacity.[44]

The following hypothetical example illustrates the differences between the infancy defense's presumption of incapacity and mens rea. Suppose that a six-year-old boy, while playing with his brother, finds his stepfather's loaded gun. The boy shoots his brother in the stomach, severely injuring him. In a jurisdiction where the infancy defense still applies, the boy would not be criminally liable. Any discussion of whether he "intended" to shoot his brother—that is, any discussion of mens rea—would be irrelevant, at least regarding any attempt by the state to prosecute the child for the crime, whether in a juvenile or criminal court.[45] In a jurisdiction that no longer adheres to the infancy defense, however, mens rea would be relevant, as an element of the alleged crime that the prosecution must establish beyond a reasonable doubt, if seeking an adjudication of delinquency or a criminal conviction.

What if the boy were eleven years old? In a jurisdiction that no longer allows the infancy defense, the state would bear the burden of proving, beyond a reasonable doubt, that the child committed the act and acted with the requisite mens rea to be adjudicated delinquent in a juvenile court (or found guilty in a criminal court). Of course, depending upon the facts of the case and the criminal acts at issue, the state might have an easier time convincing a judge or jury that an eleven-year old (as compared to a six-year old) was capable of forming the required mens rea of the charged offense.

In a state still adhering to the infancy defense, the state—in order to prosecute the eleven-year old—would first have to overcome the rebuttable presumption that children of that age are incapable of committing a crime. Even if the state is able to overcome that presumption, the prosecution must still prove, beyond a reasonable doubt, that the child acted with the requisite mens rea. In other words, the state must first prove (as a threshold matter) that the child was capable of understanding the wrongfulness of the act, and then that the child did in fact form the requisite mens rea in the instance at issue.[46] The state might overcome the presumption (by establishing that this particular child was mature enough to be held liable for criminal acts),[47] but still fail to satisfy its burden to prove mens rea—by failing to prove that the child acted with the specific

44. *See, e.g., id.*

45. However, considerations of the child's "intent"—or lack thereof—to commit the act may be relevant to the need of the state to provide psychological evaluation, counseling, or other social services. *See infra* Part V.

46. *See* Bazelon, *supra* note 23, at 160-61.

47. *Id.*

intent required of the charged offense. Of course, despite the black letter law that mens rea is an element of a crime separate from the charged act, proof of mens rea often follows from proof of the act itself.

Competency to stand trial, also known as adjudicative competency, is another threshold issue related to (but not identical to) the infancy defense. Adjudicative competency requires that a defendant have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [and] a rational as well as factual understanding of the proceedings against him."[48] A defendant found incompetent to stand trial must receive treatment with the aim of establishing competence or, if the incompetency cannot be treated, the defendant must either be released or subjected to civil commitment.[49]

Questions of adjudicative competence had little relevance in juvenile courts pre-*Gault*.[50] Many procedural protections afforded to adult defendants in criminal court were not available to children in juvenile court, since delinquency proceedings were regarded as nonadversarial interventions by the state into the lives of troubled youth.[51] As juvenile courts have come to more closely resemble criminal courts, adjudicative competency has taken on greater significance. However, the importance of competency determinations in juvenile court delinquency proceedings has received little attention, due in part to the lingering belief that juvenile court proceedings are nonadversarial and intended to determine the best interests of the child.[52] Certain states make explicit reference to

48. Dusky v. United States, 362 U.S. 402, 402 (1960). *See also* Drope v. Missouri, 420 U.S. 162, 171-72 (1975); Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, *in* YOUTH ON TRIAL 73, 76-77 (Thomas Grisso & Robert G. Schwartz eds., 2000) (analyzing elements necessary to establish adjudicative competence). The *Dusky* standard also applies to the competency of a defendant to tender a plea. *See* Godinez v. Moran, 509 U.S. 389, 389 (1993).

49. *See* Thomas Grisso et al., *Competency to Stand Trial in Juvenile Court*, 10 INT'L J.L. & PSYCHIATRY 1, 16 (1987).

50. *See* Bonnie & Grisso, *supra* note 48, at 93; Vance L. Cowden & Geoffrey R. McKee, *Competency to Stand Trial in Juvenile Delinquency Proceedings—Cognitive Maturity and the Attorney-Client Relationship*, 33 U. LOUISVILLE J. FAM. L. 629, 634 (1995).

51. *See* Bonnie & Grisso, *supra* note 48, at 93.

52. *See* Cowden & McKee, *supra* note 50, at 635-36. Other possible factors accounting for the scant attention paid to competency issues in juvenile court proceedings include: (1) the uncertain status of defense attorneys in delinquency cases, with some attorneys operating more as a guardian of the child's best interests than a zealous advocate; (2) few opportunities for appellate consideration, given the informal nature of many juvenile court hearings and other procedural aspects of the juvenile court process; and (3) the failure of counsel to recognize potential competency issues regarding their clients. *Id.* at 636-40.

competency determinations in their juvenile justice statutes or juvenile court rules.[53] A few states require that a child be found competent to stand trial before the child can be transferred or waived from juvenile to criminal court.[54] Given the rather uncertain status of adjudicative competency determinations in juvenile court, the infancy defense should be available to children facing delinquency proceedings.[55]

III. THE EVOLUTION OF THE CONTEMPORARY JUVENILE COURT

A. The Vulnerable Child in Need of Treatment (Early 1900s)

In 1899, Illinois became the first state to institute a separate juvenile court system.[56] By the early 1940s, all states had enacted legislation establishing separate courts for juvenile offenders.[57] As originally conceived, the juvenile court was premised on the doctrine of *parens patriae*.[58] Under this doctrine, the state is the supreme guardian of all children within its jurisdiction. Juvenile courts have the inherent power to intervene to protect the best interests of children whenever it is determined that the family has failed to provide adequate nurturance, moral training, or supervision.[59] Young offenders were just one class of children in need of intervention, and the court's response to this group did not differ from its response to

---

53. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-291 (West 2007); MINN. STAT. ANN. JUV. DEL. PROC. RULE § 20.01(1) (West 2007).

54. *See* Bonnie & Grisso, *supra* note 48, at 85.

55. *Cf. id.* at 97 (arguing that adjudicative competency determinations in juvenile court should have the same effect as in criminal court, but only with respect to juvenile court adjudications bearing the same consequences as sanctions in a criminal court for comparable offenses).

56. HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUST., OFF. OF JUV. JUST. AND DELINQ. PREVENTION, NAT'L CTR. FOR JUV. JUST., JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 93-99 (2006), *available at* http://ojjdp.ncjrs.gov/ojstatbb/nr2006/downloads/NR2006.pdf (summarizing history of juvenile courts in the United States). *See* Mack, *supra* note 32, at 107.

57. *See* H. Warren Dunham, *The Juvenile Court: Contradictory Orientations in Processing Offenders*, 23 LAW & CONTEMP. PROBS. 508, 509 (1958). Connecticut and Wyoming were the final two states to establish juvenile courts; all other states had followed Illinois's lead by 1923. *Id.*

58. *See, e.g.*, MASS. ANN. LAWS ch. 119, § 53 (LexisNexis 2002) (original version at ch. 413, § 2 (1906)) ("as far as practicable, [children brought before the juvenile court] shall be treated, not as criminals, but as children in need of aid, encouragement and guidance"); *see also* ZIMRING, *supra* note 33, at 5-6; Mack, *supra* note 32, at 104 ("[T]he state is the higher or the ultimate parent of all of the dependents within its borders."); *id.* at 109 (stating that the purpose of juvenile courts is "[t]o save [the child] from the brand of criminality, the brand that sticks to it for life; to take it in hand and instead of first stigmatizing and then reforming it, to protect it from the stigma").

59. *See* Mack, *supra* note 32, at 107, 109.

abused or neglected children in need of protection and supervision.[60] Accordingly, proceedings involving juvenile offenders were described as "civil," and constitutional requirements restricting state action when an individual's liberty was at stake were considered irrelevant.[61]

The progressive reformers who launched the juvenile court movement wished to address the breakdown of traditional family structures and other problems attendant to youth in the nation's growing, industrialized cities.[62] This paternalistic impulse behind the creation of juvenile courts coupled with an assimilative urge regarding the wave of immigrants in the late nineteenth and early twentieth centuries.[63] Critics have argued that the juvenile courts were designed as much to "Americanize" immigrants and to exert social control over the poor as to rehabilitate wayward youth.[64]

B. The "Worst of Both Worlds" (1960s)

By the late 1960s, it was clearly established that the juvenile court had not lived up to its ideals.[65] Despite the rhetoric of treatment and rehabilitation, punishment of the juvenile offender was commonplace and well documented.[66] The invidious connotations

---

60. *See* Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 695 (1991).

61. *See id.*

62. *See* Solomon J. Greene, Note, *Vicious Streets: The Crisis of the Industrial City and the Invention of Juvenile Justice*, 15 YALE J.L. & HUMAN. 135, 136-37 (2003).

63. *See* Feld, *supra* note 60, at 693-95 (discussing the "child-savers" movement and the origins of the juvenile court); Mack, *supra* note 32, at 116-17 (noting that parents of children brought before the juvenile courts in the early twentieth century were often foreigners "without an understanding of American methods and views" and in need of "kindly assistance").

64. *See* Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the "Crack Down" on Youth Crime*, 84 MINN. L. REV. 327, 339 (1999).

65. The Supreme Court echoed this sentiment in *Kent v. United States*, 383 U.S. 541 (1966), and *In re Gault*, 387 U.S. 1 (1967). One reason the juvenile courts failed to fulfill their rehabilitative purpose was a lack of adequate funding. *See* Fox, *supra* note 29, at 673.

> [I]f it is recalled that "juvenile delinquent" has traditionally referred to anti-social children, trespassers on middle-class norms, and junior enemies of the community, then it is more understandable that the public has been reluctant to open its purse for the benefit of those who stand poised against it. . . . So long as the legal system thus isolates and highlights that aspect of the child which rationally calls for the least sympathy, and ignores the conditions of his life that would evoke a desire to help, the law simply serves to reinforce the severity of public attitudes.

Id.

66. *See Gault*, 387 U.S. at 25-26; Commonwealth v. Rodriguez, 382 N.E.2d 725, 728 (Mass. 1978) ("A half century's bitter experience has taught that where the safeguards attaching to criminal trials are foregone in juvenile proceedings, while the

attached to the term "delinquent" evolved to the extent that they did not differ substantially from those associated with the term "criminal."[67] In response to the harsh realities arising out of delinquency adjudications, the Supreme Court issued a series of decisions that reshaped contemporary juvenile court proceedings.

In *Kent v. United States*, the Court first seriously addressed the inadequacies of the juvenile court.[68] The Court noted that:

> [T]here is much evidence that some juvenile courts . . . lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity . . . there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.[69]

In *Kent*, the Court declined to rule on the possible unconstitutionality of the procedural protections afforded to children in juvenile court.[70] However, *Kent* laid the groundwork for the Court's due-process based overhaul of juvenile courts in *Gault* and subsequent cases.

In *Gault*, the Court further addressed the failure of the juvenile court system to live up to the ideals of its founders. While acknowledging "the highest motives and most enlightened impulses" behind the founding of juvenile courts, the Court noted that "in practice . . . the results have not been entirely satisfactory."[71] The Court held that the essentials of due process—notice, counsel, confrontation, cross-examination, and the privilege against self-incrimination—were required in juvenile court proceedings.[72]

In 1970, the Supreme Court, elaborating on the procedural and functional equivalence between criminal and delinquency proceedings, held that proof beyond a reasonable doubt was a constitutional requirement in juvenile proceedings and double

---

realities, after delinquency is found, fall short of the rehabilitative aspirations of the early sponsors of juvenile courts, children subjected to the process may be twice deprived.").

67. *Gault*, 387 U.S. at 23-24.

68. 383 U.S. 541 (1966).

69. *Id.* at 555-56.

70. *Id.* at 556.

71. *Gault*, 387 U.S. at 17-18.

> It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time.

Id. at 27.

72. *Id.* at 30.

jeopardy protections must also apply.[73] By the early 1970s, it was clear that a finding of delinquency unmistakably connoted individual blameworthiness and subjected the child to punishment.[74] By recognizing that a delinquency proceeding was tantamount to a criminal prosecution, the Supreme Court in effect "placed the concept of criminal culpability at the heart of the [delinquency] proceeding."[75]

C. "Get Tough" Response to Juvenile Crime (1990s)

By the 1980s and 1990s, rising rates of juvenile crime[76] led to growing dissatisfaction with the juvenile justice system.[77] Critics decried the supposed "leniency" of the rehabilitative model of juvenile courts, and called for a "get tough" policy regarding youth crime.[78] Many state legislatures responded by amending juvenile justice statutes, shifting to a greater emphasis on punishment as opposed to the treatment and rehabilitation at the heart of the *parens patriae* model of the juvenile court.[79] Several states explicitly amended the purpose clauses of their juvenile justice statutes to reflect this shift away from rehabilitation and toward greater emphasis on punishment and personal accountability.[80] Only a few states continue

---

73. *See In re* Winship, 397 U.S. 358, 365 (1970) ("The same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child."); *see also* Breed v. Jones, 421 U.S. 519, 530 (1975) ("[I]n terms of potential consequences, there is little to distinguish an adjudicatory hearing . . . from a traditional criminal prosecution.").

74. *Gault*, 387 U.S. at 22-27.

75. *See* Walkover, *supra* note 7, at 521.

76. *See* Feld, *supra* note 64, at 361-66. *But see* FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE 31-47 (1998) (expressing skepticism as to whether arrest statistics from 1980–1996 clearly establish rising rates of juvenile crime).

77. *See* Jarod K. Hofacket, Note, *Justice or Vengeance: How Young is Too Young for a Child to be Tried and Punished as an Adult?*, 34 TEX. TECH L. REV. 159, 164 (2002-03); Bazelon, *supra* note 23, at 176-77.

78. Bazelon, *supra* note 23, at 176-77; SNYDER & SICKMUND, *supra* note 56, at 96. *See also* Hofacket, *supra* note 77, at 164-68; Scott & Steinberg, *supra* note 9, at 807-11 (describing "moral panic" and exaggerated fears of increased youth violence, including racial and ethnic bias, leading to calls for overhaul of juvenile justice system).

79. *See* SNYDER & SICKMUND, *supra* note 56, at 96-97; Scott & Steinberg, *supra* note 9, at 805-06 (describing circumstances leading up to legislative reform of juvenile justice system in 1990s); Randi-Lynn Smallheer, Note, *Sentence Blending and the Promise of Rehabilitation: Bringing the Juvenile Justice System Full Circle*, 28 HOFSTRA L. REV. 259, 272-75 (1999); ZIMRING, *supra* note 76, at 11-15 (describing scope of legislative responses in 1990s to youth violence).

80. *See* Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 841-45 (1988) (discussing amendments to purpose clauses in several states).

to emphasize the welfare or rehabilitation of the child as the sole or primary purpose behind their juvenile justice system.[81]

During the 1990s, almost all states amended substantive or procedural provisions of their juvenile justice statutes, making juvenile justice systems more punitive in various ways.[82] Forty-seven states enacted laws eliminating or reducing the confidentiality of juvenile court records and proceedings.[83] Fourteen states now open delinquency proceedings to the public, and all states specify conditions allowing various stakeholders (such as social service agencies, school districts, or victims) access to records of juvenile court proceedings.[84] These reductions in confidentiality have resulted in delinquency proceedings that more closely resemble the public and punitive focus of adult criminal proceedings.[85]

Forty-five states enacted legislation that facilitated the transfer of children from the juvenile justice system to the criminal justice system.[86] There are a variety of provisions permitting the transfer of children from juvenile to criminal court, including judicial waiver[87] (the most common method of transfer), and prosecutorial discretion to try certain crimes in either criminal or juvenile court.[88] Many

---

81. *See* SNYDER & SICKMUND, *supra* note 56, at 99. Massachusetts remains one of the few states with a purpose clause still focusing on the needs of the juvenile offender. MASS. ANN. LAWS ch. 119, § 53 (LexisNexis 2002) ("[The juvenile court provisions of the statute] shall be liberally construed so that the care, custody and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents, and that, as far as practicable, they shall be treated, not as criminals, but as children in need of aid, encouragement and guidance.").

82. *See* SNYDER & SICKMUND, *supra* note 56, at 96-97.

83. *See id.* at 97. For example, Massachusetts amended its statute in 1996 such that the records of proceedings involving youthful offenders conducted pursuant to an indictment, but not other cases involving delinquency, "shall be open to public inspection in the same manner and to the same extent as adult criminal court records." MASS. ANN. LAWS ch. 119, § 60A. *See generally* Emily Bazelon, *Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?*, 18 YALE L. & POL'Y REV. 155 (1999-2000).

84. SNYDER & SICKMUND, *supra* note 56, at 108-09.

85. *See* ZIMRING, *supra* note 76, at 15.

86. *See* SNYDER & SICKMUND, *supra* note 56, at 96.

87. Judicial waiver or transfer involves a hearing before a judge who must determine whether the juvenile should be tried in juvenile court or transferred to criminal court. *See* Thomas F. Geraghty & Will Rhee, *Learning from Tragedy: Representing Children in Discretionary Transfer Hearings*, 33 WAKE FOREST L. REV. 595, 602 (1998). At a judicial transfer hearing, the parties may produce evidence (including expert testimony) as to the likelihood of the child's successful rehabilitation. *See id.* at 603.

88. *See id.* at 606-07. In states allowing prosecutorial discretion to transfer cases to criminal court, the juvenile's attorney is denied the opportunity to present evidence

states also allow for the automatic transfer of children to criminal courts in cases involving particularly serious crimes.[89] Several states also lowered the minimum age over which the criminal courts have jurisdiction.[90] While many states extend juvenile court jurisdiction to cases involving children aged seventeen or younger, some states have lowered the maximum age of children over which juvenile courts have jurisdiction to as young as fifteen.[91]

Thirty-one states also expanded the sentencing options available to both juvenile courts and criminal courts for cases involving minors.[92] Typically, sentencing provisions in juvenile courts are tied to the nature of the offense, rather than to the needs of the child.[93] This shift in emphasis from offender to offense provides further evidence of the dissolution of the *parens patriae* model of the juvenile court.[94]

At least fifteen states have also adopted blended sentencing for serious offenses committed by juveniles.[95] Typically, blended sentencing provisions allow juvenile court judges to order both a juvenile delinquency adjudication and a criminal sanction, suspending the criminal sanction on condition that the juvenile comply with the provisions of the delinquency determination.[96] Among those states with blended sentencing provisions, some allow the imposition of such sentencing on children as young as ten.[97]

These changes to the juvenile justice system may satisfy public sentiment seeking a tough stance on youth crime. Yet, as the nation's juvenile courts have come to more closely resemble adult criminal

---

before a judge concerning the appropriate forum in which to adjudicate the case. *See id.*

89. *See id.* at 605-06. "The proliferation of automatic transfer statutes—statutes that value only punishment and not rehabilitation—by state legislatures in recent years has sent a clear message to state judges that punishment is to be valued more than rehabilitation." *Id.* at 609 n.36.

90. Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143, 143-44 (2003).

91. SNYDER & SICKMUND, *supra* note 56, at 103.

92. *Id.* at 96.

93. *See* Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 82-86 (1997).

94. *See id.*

95. SNYDER & SICKMUND, *supra* note 56, at 115. *See generally* Smallheer, *supra* note 79.

96. SNYDER & SICKMUND, *supra* note 56, at 115.

97. *Id.* For example, Ohio allows for "discretionary serious youthful offender status"—a form of blended sentencing—for children as young as ten who are adjudicated delinquent "for committing an act that would be aggravated murder or murder if committed by an adult." OHIO. REV. CODE ANN. § 2152.11 (West 2002).

courts,[98] an increasing scientific consensus has emerged that counsels for a return to the rebuttable presumption of incapacity when children are charged with criminal acts. The following section addresses the science supporting the infancy doctrine.

D. Brain Research (2000s)

For over fifty years, psychological research has documented the differences between children and adults in cognitive, social, emotional, and moral development.[99] Children and adolescents' immature reasoning, judgment, and lack of impulse control adversely impact their ability to exercise the reasoned decision making expected of adults.[100] Recent studies of the human brain confirm that "[a]dolescents' behavioral immaturity mirrors the anatomical immaturity of their brains."[101] Children think and feel differently than adults due to differences in brain development in areas affecting impulse control and the ability to assess risks.[102]

---

98. One commentator has argued that juvenile courts now so closely resemble adult criminal courts, except for the "persisting procedural deficiencies" of juvenile courts, that states should abolish the juvenile court. *See* Feld, *supra* note 93, at 68-70. Juveniles would thus be subject to prosecution in adult criminal court, but courts would "recognize youthfulness as a mitigating factor in sentencing . . . ." *Id.*

99. *See, e.g.*, Lawrence Kohlberg, *The Development of Children's Orientations Toward a Moral Order: I. Sequence in the Development of Moral Thought*, 6 VITA HUMANA 11, 30 (1963) ("[L]arge groups of moral concepts and ways of thought only attain meaning at successively advanced ages and require the extensive background of social experience and cognitive growth represented by the age factor."); Walkover, *supra* note 7, at 541-42 ("While research since Piaget has tended to view moral development more in terms of a continuum than stages . . . the conclusion that younger children generally lack the internalized set of social controls found in late adolescents has been confirmed."); Elizabeth Caufman & Laurence Steinberg, *(Im)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 756-59 (2000) (explaining that children discount future consequences more than adults, are less able to take the perspective of another, and are more susceptible to peer pressure).

100. *See* Scott & Steinberg, *supra* note 9, at 813-16 (summarizing research on immature judgment, failure to adequately assess risks, and impulsivity in adolescent decision making).

101. Brief for the American Medical Association et al. as Amici Curiae Supporting Respondent at 10, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1633549 [hereinafter AMA Brief] (citing Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174 (2004).

102. *See* AMA Brief, *supra* note 101, at 5; Sarah Durston et al., *Anatomical MRI of the Developing Human Brain: What Have We Learned?*, 40 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1012 (2001) (assessing MRI studies of brain development in childhood and adolescence); Gogtay et al., *supra* note 101; V.S. Caviness, Jr. et al., *The Human Brain Age 7-11 Years: A Volumetric Analysis Based on Magnetic Resonance Images*, 6 CEREBRAL CORTEX 726 (1996); Catherine Chiron et al., *Changes in Regional Cerebral Blood Flow During Brain Maturation in Children and Adolescents*, 33 J.

Magnetic resonance imaging (MRI) has enabled scientists to document the development of the human brain as it progresses throughout the human life cycle.[103] Brain imaging studies in normal children and adolescents have allowed scientists to connect the maturation of cognitive, social, and emotional development to the structural features in the brain.[104] For example, when processing information, children rely "on the amygdala, the area of the brain associated with primitive impulses . . . [such as] aggression . . . and fear."[105] In contrast, "[a]dults . . . process similar information through the frontal cortex, [an area of the brain] associated with impulse control and good judgment."[106] The prefrontal cortex is also the area of the brain associated with cognitive abilities such as decision making, risk assessment, judging future consequences, and making moral judgments.[107] The brain-imaging studies provide credible evidence that the prefrontal cortex is one of the last sections of the brain to mature.[108] Significantly, among the last areas of the brain to reach full maturity is the portion associated with risk assessment, impulse control, behavior regulation, and moral reasoning.[109]

The developmental sequencing in brain maturation and cognitive functioning strikingly parallels the age grading associated with the common law infancy defense. The younger the child, the less capable he is of making sound judgments and moral distinctions, the less aware he is of the consequences of his actions, and the less able he is to control his impulses.[110] The principle, at common law, that a child

---

NUCLEAR MED. 696, 703 (1992); Jay N. Giedd et al., *Quantitative Magnetic Resonance Imaging of Human Brain Development: Ages 4-18,* 6 CEREBRAL CORTEX 551 (1996) [hereinafter Giedd et al., *Quantitative MRI*]; Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study,* 2 NATURE NEUROSCIENCE 861 (1999) [hereinafter Giedd et al., *Brain Development*].

103. *See* Giedd et al., *Quantitative MRI*, *supra* note 102; Giedd et al., *Brain Development*, *supra* note 102; Elizabeth R. Sowell et al., *Mapping Cortical Change Across the Human Life Span*, 6 NATURE NEUROSCIENCE 309 (2003).

104. *See* Gogtay, *supra* note 101, at 8177.

105. AMA Brief, *supra* note 101, at 11. *See also* Abigail A. Baird et al., *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 195, 195 (1999).

106. AMA Brief, *supra* note 101, at 11.

107. *Id.* at 13-14. *See also* Antoine Bechara et al., *Dissociation of Working Memory from Decision Making Within the Human Prefrontal Cortex*, 18 J. NEUROSCIENCE 428 (1998); Facundo Manes et al., *Decision Making Processes Following Damage to the Prefrontal Cortex*, 125 BRAIN 624 (2002); Jorge Moll et al., *Frontopolar and Anterior Temporal Cortex Activation in Moral Judgment Task: Preliminary Functional MRI Results in Normal Subjects*, 59 ARQUIVOS DE NEURO-PSIQUIATRIA 657 (2001).

108. *See* Gogtay, *supra* note 101, at 8174 (subjects of study aged four to twenty-one years); Sowell, *supra* note 103, at 309 (study of subjects ages seven to eighty-seven).

109. *See* AMA Brief, *supra* note 101, at 20; Gogtay, *supra* note 101, at 8177.

110. *See supra* notes 100-102 and accompanying text.

under fourteen is presumed *doli incapax* is now buttressed by neurological and psychological studies of child development.[111]

In 2005, the Supreme Court cited evidence of developmental differences between juveniles and adults in *Roper v. Simmons*, holding the juvenile death penalty unconstitutional.[112] The Court noted three prominent differences between juveniles under eighteen and adults in support of its holding that juveniles should not be subject to capital punishment, a criminal sanction reserved only for the most blameworthy offenders.[113] First, the Court noted the "lack of maturity and an underdeveloped sense of responsibility" of juveniles, often resulting in "impetuous and ill-considered actions and decisions."[114] Second, the Court stressed that those under eighteen are more susceptible to peer pressure and other potentially negative outside influences.[115] Lastly, the Court noted that the "character of a juvenile is not as well formed as that of an adult."[116] The Court concluded that these developmental differences render children less culpable for criminal behavior than adults: "From a moral standpoint, it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."[117]

While the Court's use of scientific evidence in *Roper* is not without controversy,[118] *Roper* represented a clear acknowledgement by the Court that developmental research can play a role in the determination of the proper scope of children's culpability for crime.[119] The Court's discussion in *Roper* of developmental differences between juveniles and adults also supports the

111. *See id. See generally supra* notes 21-26 and accompanying text.

112. 543 U.S. 551 (2005). *See also* Laval S. Miller-Wilson, *Law and Adolescence: Examining the Legal and Policy Implications of Adolescent Development Research for Youth Involved in the Child Welfare, Juvenile Justice, or Criminal Justice Systems*, 79 TEMP. L. REV. 317, 320-22 (2006) (summarizing research on adolescent development, including studies cited in *Roper*).

113. *Roper*, 543 U.S. at 569.

114. *Id.* (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

115. *Id.* at 569.

116. *Id.* at 570.

117. *Id.*

118. *See generally* Deborah W. Denno, *The Scientific Shortcomings of* Roper v. Simmons, 3 OHIO ST. J. CRIM. L. 379 (2006) (arguing that the *Roper* Court reached the proper result, but that the Court's reliance upon outdated research and lack of scientific sources cited in the opinion potentially limits the case's value as a precedent for the role of social-science research in the law).

119. For a summary of the recent influence of cognitive neuroscience in the legal system, see Brent Garland & Paul W. Glimcher, *Cognitive Neuroscience and the Law*, 16 CURRENT OPINION IN NEUROBIOLOGY 130, 130-34 (2006).

reinvigoration of the infancy defense in juvenile court proceedings.[120] If juveniles are more likely than adults to engage in irresponsible behavior due to a lack of maturity and to succumb to peer pressure,[121] then their blameworthiness for criminal acts should not be equated with that of adult offenders. Moreover, if the character of juveniles is less fixed than that of adults,[122] then children are more likely to respond to treatment.[123]

In our criminal justice system, a judge or jury decides a case on the facts involving the particular defendant on trial, not upon statistical averages or stereotypes. The rebuttable presumption of the infancy defense for children aged seven to fourteen allows for this fact-specific inquiry.[124] While research might show that most children under fourteen have not attained a sufficient level of cognitive functioning to face a delinquency proceeding, the particular child charged with a delinquent act might be mature enough to warrant such a proceeding. Given the weight of the scientific consensus concerning juvenile development,[125] children seven to fourteen deserve the benefit of a presumption of incapacity to commit crime. Yet, if the state can overcome that presumption regarding a particular child, that child will face a proceeding in juvenile court. Thus, the infancy defense allows for delinquency proceedings involving children aged seven to fourteen only when the state can demonstrate that the child's maturity and development render him capable of comprehending the nature and wrongfulness of unlawful acts.

IV. APPLICATION OF THE INFANCY DEFENSE IN THE CONTEMPORARY JUVENILE COURT

A. National Data Describing Juveniles, Juvenile Court Jurisdiction, Caseloads, and Sanctions

While there is a growing concern and focus on the waiver of juveniles into criminal court,[126] the overwhelming majority of

120. *Roper*, 543 U.S. at 569-74.

121. *Id.* at 569.

122. *Id.* at 570.

123. The Progressive reformers behind the founding of the juvenile court movement also believed that juveniles were more susceptible to treatment than adults. *See* Christopher Slobogin et al., *A Prevention Model of Juvenile Justice: The Promise of* Kansas v. Hendricks *for Children*, 1999 WIS. L. REV. 185, 190.

124. *See supra* notes 27-30 and accompanying text.

125. *See supra* notes 99-102 and accompanying text.

126. *See, e.g.*, Lisa M. Flesh, *Juvenile Crime and Why Waiver Is Not the Answer*, 42 FAM. CT. REV. 583 (2004); Sally T. Green, *Prosecutorial Waiver into Adult Criminal Court: A Conflict of Interests Violation Amounting to the States' Legislative Abrogation*

arrested children still face delinquency proceedings in juvenile courts rather than waiver to criminal court.[127] There are also potentially serious consequences to an adjudication of delinquency, as discussed in Part IV.C below. The following brief statistical survey demonstrates the huge number of children subject to penalties in juvenile court.

In 2002, approximately 73 million persons in the United States were under age eighteen.[128] "In 2003, law enforcement agencies reported 2.2 million arrests of persons under age eighteen."[129] Moreover, seventy-one percent of those arrested were male, and sixty-eight percent were sixteen to seventeen years old.[130] Of those juveniles arrested in 2003 who were eligible for juvenile court proceedings, seventy-one percent were in fact referred to juvenile court, while only seven percent were referred to criminal court.[131] The remaining cases were either handled by law enforcement without involving the courts, or referred to social services or another police agency.[132]

Juvenile courts handled 1.6 million cases in 2002, of which twenty-four percent were person offenses, thirty-nine percent were property offenses, twelve percent were drug offenses, and twenty-five percent were public disorder offenses, which included obstruction of justice and weapons offenses.[133] Among those cases, 934,900 (fifty-eight percent) were processed formally.[134] Of those formally processed, 624,500 (sixty-seven percent) were adjudicated delinquent.[135] Of those adjudicated delinquent, sixty-two percent were placed on probation and twenty-three percent were ordered to

---

of Juveniles' Due Process Rights, 110 PENN. ST. L. REV. 233 (2005); Joshua T. Rose, Note, *Innocence Lost: The Detrimental Effect of Automatic Waiver Statutes on Juvenile Justice*, 41 BRANDEIS L.J. 977 (2003).

127. *See* SNYDER & SICKMUND, *supra* note 56, at 186-87.

128. *Id.* at 2.

129. *Id.* at 125. Of those arrested, seventy-one percent were white, twenty-seven percent black, two percent Asian, and one percent American Indian. *Id.* Of the total under-eighteen population in 2002, 77.9% were "classified as white, 16.4% black, 1.4% American Indian, and 4.4% Asian." *Id.* at 2. Also, "18% of juveniles in the U.S. were of Hispanic ethnicity." *Id.*

130. SNYDER & SICKMUND, *supra* note 56, at 125. For a thorough discussion of the role of gender in juvenile court proceedings, see generally Jennifer Thibodeau, Note, *Sugar and Spice and Everything Nice: Female Juvenile Delinquency and Gender Bias in Punishment and Behavior in Juvenile Courts*, 8 WM. & MARY J. WOMEN & L. 489 (2002).

131. SNYDER & SICKMUND, *supra* note 56, at 152.

132. *See id.*

133. *Id.* at 157.

134. *Id.* at 172.

135. *Id.*

residential treatment.[136] Less than 7100 (one percent) of juveniles facing delinquency proceedings were waived into criminal court.[137]

"In 2003, 307 juvenile offenders were in custody for every 100,000 juveniles in the U.S. population" aged ten through each state's upper age limit for juvenile court jurisdiction.[138] This totals approximately 96,000 juveniles in custody—either detained or committed.[139]

B. State Profiles Regarding the Acceptance or Rejection of the Infancy Defense in Delinquency Proceedings—Analysis of Reasoning Underlying Court Decisions

Applicability of Infancy Defense in Juvenile Court					
State (& D.C.)	Infancy Defense		Leading Case		Recent Cases Affirming Decision
	Status	Applicable?	Citation	Reasoning	Citation
California	Settled	Yes	*In re* Gladys R, 464 P 2d 127 (Cal 1970)	JJ Statute—no explicit repeal of infancy defense	*In re* Paul C, 270 Cal Rptr. 369 (Ct. App 1990), *In re* Marven C., 39 Rptr 2d 354 (Cal. Ct. App 1995).
Maryland	Settled	Yes	*In re* William A, 548 A 2d 130 (Md. 1988)	JJ Statute—no explicit repeal of infancy defense	*In re* Devon T, 584 A 2d 1287 (Md 1991), *In re* Anthony W., 879 A.2d 717, 726 n.8 (Md 2005)
Washington	Settled	Yes	State v Q.D, 685 P 2d 557 (Wash 1984)	JJ = punishment	State v Ramer, 86 P 3d 132 (Wash 2004).
Alabama	Settled	No	Jennings v State, 384 So 2d 104 (Ala. 1980)	JJ = rehabilitation	M S v State, 625 So 2d 1187 (Ala. Ct. App. 1993).
Arizona	Settled	No	Gammons v Berlat, 696 P 2d 700 (Ariz 1985)	JJ = rehabilitation	
Connecticut	Settled	No	*In re* Tyvonne, 558 A.2d 661 (Conn. 1989)	JJ = rehabilitation	
Florida	Settled	No	State v. D H, 340 So 2d 1163, 1165 (Fla. 1976).	JJ = rehabilitation	Tate v State, 864 So 2d 44 (Fla. Dist Ct App 2003)

136. *Id.* at 175.
137. *Id.* at 177.
138. *Id.* at 201.
139. *Id.*

Georgia	Settled	No	K M S. v. State, 200 S E 2d 916, (Ga. Ct. App. 1973).	JJ = rehabilitation	
Illinois	Settled	No	*In re* Carson, 295 N.E.2d 740 (Ill App Ct. 1973).	JJ = rehabilitation	*In re* Dow, 393 N E.2d 1346 (Ill App. Ct 1979)
Massachusetts	Settled	No	Commonwealth v Ogden O, 864 N.E 2d 13 (Mass. 2007).	JJ = rehabilitation	
New Jersey	Settled	No	State v. Monahan, 104 A 2d 21 (N J 1954)	JJ = rehabilitation	
New York	Settled	No	*In re* Robert M , 441 N Y S 2d 860 (Fam Ct. 1981), amendment to laws overturned *In re* Andrew M , 398 N Y S 2d 824 (Fam. Ct. 1977).	JJ = rehabilitation	*In re* Raymond G , 715 N E.2d 486 (N.Y. 1999).
North Dakota	Settled	No	*In re* M.C.H., 637 N.W 2d 678 (N D. 2001).	Infancy defense eliminated by statute	
Oklahoma	Settled	No	G J I v State, 778 P 2d 485 (Okla. Crim App. 1989).	None given	
Pennsylvania	Settled	No	*In re* G T , 597 A 2d 638 (Pa. Super Ct. 1991), *overruling* Com v. Durham, 389 A 2d 108 (Pa. Super. Ct. 1978)	JJ = rehabilitation	
Rhode Island	Settled	No	*In re* Michael, 423 A.2d 1180, 1182 (R.I 1981).	JJ = rehabilitation	
South Carolina	Settled	No	*In re* Skinner, 249 S E 2d 746 (S.C. 1978).	JJ = rehabilitation	*In re* Doe, 458 S E 2d 556 (S C Ct. App. 1995) (referencing *Skinner* as good law).
Tennessee	Settled	No	Juvenile Court of Shelby County v State, 201 S.W. 771 (Tenn 1918)	JJ = rehabilitation	
Kentucky	Unclear	No	Recent unpublished case on point W D B v Commonwealth, 2007 WL 4139484 (Ky 2007)		

Nevada	Unclear	No	No case directly on point, but *Naovarath v. State*, 779 P 2d 944, 946 n.3 (Nev. 1989) implies that the infancy defense is not applicable in juvenile court.		
Alaska	Unclear		No case on point		
Arkansas	Unclear		No case on point		
Colorado	Unclear		No case on point		
Delaware	Unclear		No case on point		
Hawaii	Unclear		No case on point		
Idaho	Unclear		No case on point		
Indiana	Unclear		No case on point		
Iowa	Unclear		No case on point		
Kansas	Unclear		No case on point		
Louisiana	Unclear		No case on point		
Maine	Unclear		No case on point		
Michigan	Unclear		No case on point		
Minnesota	Unclear		No case on point		
Mississippi	Unclear		No case on point		
Missouri	Unclear		No case on point		
Montana	Unclear		No case on point, but reasoning in *In re S L.M*, 951 P.2d 1365 (Mont. 1997), indicates belief that juvenile courts are now punitive, not just rehabilitative		
Nebraska	Unclear		No case on point		
New Hampshire	Unclear		No case on point		
New Mexico	Unclear		No case on point		
North Carolina	Unclear		No case on point		
Ohio	Unclear		No case on point		
Oregon	Unclear		No case on point		
South Dakota	Unclear		No case on point		
Texas	Unclear		No case on point		
Utah	Unclear		No case on point		
Vermont	Unclear		No case on point		
Virginia	Unclear		No case on point		
West Virginia	Unclear		No case on point		
Wisconsin	Unclear		No case on point		

Wyoming	Unclear		No case on point		

While certain state juvenile justice statutes have codified a modified version of the infancy defense,[140] most state statutes do not explicitly address the status of the common law infancy doctrine. However, relying primarily upon lingering *parens patriae* justifications, many state court decisions have rejected the use of the infancy defense in delinquency proceedings.[141]

For example, in 1980 the Supreme Court of Alabama ruled the infancy defense inapplicable to delinquency proceedings in *Jennings v. State*.[142] The court found that the state's juvenile justice statute established a system "whose aim is rehabilitative rather than retributive," while still granting due process protections to juveniles charged with delinquency.[143] The court concluded that application of the infancy defense would deny children charged with delinquency "urgently needed therapy and supervision, and perhaps endanger those around [them]."[144]

Applying similar reasoning, the Supreme Court of Connecticut rejected the applicability of the infancy defense in 1989 in *In re Tyvonne*.[145] The court found it "clear . . . that the purpose of the [state's juvenile justice statute] is clinical and rehabilitative, rather than retributive or punitive."[146] The court declined to construe legislative silence as acquiescence to the continued vitality of the infancy defense in the state, "in light of the legislation's obvious and singular remedial objectives."[147] The court also rejected the child's argument that the availability of the infancy defense was mandated due to a failure by the state's juvenile justice system to conform to its rehabilitative purpose.[148]

Notably, most of the decisions rejecting the infancy defense were decided pre-1990, prior to the shift toward a more explicitly punitive

140. *See, e.g.*, MINN. STAT. ANN. § 609.055 (West 2003).

141. *See, e.g., In re* Michael, 423 A.2d 1180, 1183 (R.I. 1981) ("Once one accepts the principle that a finding of delinquency . . . is not the equivalent of a finding that the juvenile has committed a crime, there is no necessity of a finding that the juvenile had such maturity that he or she knew what he or she was doing was wrong.").

142. 384 So. 2d 104 (Ala. 1980).

143. *Id.* at 105.

144. *Id.* at 105-06.

145. 558 A.2d 661 (Conn. 1989). For a more thorough analysis of *In re Tyvonne* and the status of the infancy defense in Connecticut, see generally D. Keith Foren, Casenote, In Re Tyvonne M. *Revisited: The Criminal Infancy Defense in Connecticut,* 18 QUINNIPIAC L. REV. 733 (1999).

146. *Tyvonne*, 558 A.2d at 665-66.

147. *Id.* at 666.

148. *See id.* at 667-68.

juvenile justice system.[149] To the extent these opinions relied more on the rhetoric than the reality of the nonpunitive nature of juvenile courts, these cases were arguably questionable at the time of decision. In the wake of post-1990 juvenile court reforms creating a more explicit emphasis on punishment, decisions denying the infancy defense due to the *parens patriae* nature of juvenile courts rest upon shaky ground.[150]

In contrast, states affirming the use of the infancy defense have openly confronted the evolution toward criminalization of juvenile court proceedings with the attendant concept of culpability.[151] In 1991, the State of Maryland, in a landmark case, *In re Devon*, affirmed the viability of the infancy defense in juvenile court.[152] The court in *Devon* followed the path of the Supreme Court in *Gault*, addressing the failures of the modern juvenile court to live up to the *parens patriae* ideal.[153] The court noted that in the years since the founding of the juvenile court, "delinquency adjudications . . . took on, in practice if not in theory, many of the attributes of junior varsity criminal trials."[154] The court later described the impact of the criminalization of juvenile courts on the availability of the infancy defense:

> In terms of the applicability of the infancy defense to delinquency proceedings, the implications of the new dispensation are clear. A finding of delinquency . . . unmistakably connotes some degree of blameworthiness and unmistakably exposes the delinquent to, whatever the gloss, the possibility of unpleasant sanctions. Clearly, the juvenile would have as an available defense to the delinquency charge 1) the fact that he was too criminally insane to have known what he did was wrong, 2) that he was too mentally retarded to have known what he did was wrong, or 3) that he was too involuntarily intoxicated through no fault of his own to have

149. *See supra* Part III.C.

150. For example, six years after *In re Tyvonne*, the Connecticut legislature amended its juvenile justice statute, moving away from its rehabilitative purpose toward a greater emphasis on crime prevention. *See* 1995 Conn. Legis. Serv. 95-225 (West); *see also* Foren, *supra* note 145, at 753-55. Following the 1995 amendments, the first goal listed in the Connecticut juvenile justice statute's purpose clause is to "hold juveniles accountable for their unlawful behavior." CONN. GEN. STAT. § 46b-121(h) (2007). This renders the holding in *In re Tyvonne* potentially subject to challenge, to the extent the holding depended upon the rehabilitative, nonpunitive nature of Connecticut's juvenile courts. *See* Foren, *supra* note 145, at 755-64.

151. *See, e.g.*, State v. Q.D., 685 P.2d 557, 560 (Wash. 1984) (holding that the infancy defense should be available in juvenile proceedings that are essentially criminal in nature).

152. 584 A.2d 1287, 1293 (Md. Ct. Spec. App. 1991).

153. *See id.* at 1291; *see also supra* note 71 and accompanying text.

154. *Devon*, 584 A.2d at 1291.

> known what he did was wrong. It would be inconceivable that he could be found blameworthy and suffer sanctions, notwithstanding precisely the same lack of understanding and absence of moral accountability, simply because the cognitive defect was caused by infancy rather than by one of the other incapacitating mechanisms.[155]

Devon presents a compelling example for litigants in other states contending that the infancy defense should apply in the contemporary, quasi-criminal juvenile court. The case also can serve as a model for other states regarding how the doctrine can apply in a modern setting. While affirming that the infancy defense is available to children under fourteen in delinquency proceedings, the court in *Devon* held that the state had successfully carried its burden to overcome the presumption against Devon's criminal capacity.[156] The court relied, in part, on the sliding scale nature of the presumption in holding that the state met its burden to demonstrate that Devon (who was approximately six weeks shy of his fourteenth birthday at the time of the incident) understood the wrongfulness of his act.[157]

Capacity determinations, by their nature, are fact-specific inquiries and must be determined on a case-by-case basis.[158] Absent the infancy defense, a juvenile delinquency proceeding may produce the unacceptable result of subjecting a child who is not culpable to punishment. Accordingly, the viability of the infancy defense should be affirmed.

---

155. *Id.* at 1292.

156. *Id.* at 1297.

157. *Id.* at 1296-97 ("The evidence before [the judge] that Devon, at the time of the allegedly delinquent act, was 13 years, 10 months, and 2 weeks of age was substantial, although not quite sufficient, proof of his cognitive capacity.").

158. Case law suggests a number of factors that a court may consider when determining whether a child has the requisite capacity to understand the wrongfulness of his conduct. These factors include age, experience and knowledge, *see In re* Gladys R., 464 P.2d 127, 134 (Cal. 1970), "observation of [the child] in the courtroom, and evidence of . . . conduct during the crimes charged . . . ," *see In re* Cindy E., 147 Cal. Rptr. 812, 815 (Ct. App. 1978), the mental and psychological makeup of the child, his IQ, his social maturity, his societal adjustment, and his basic personality, *see Devon*, 584 A.2d 1296.

Massachusetts's juvenile courts routinely assess such factors when determining, under the totality of the circumstances, whether a child made a knowing, intelligent, and voluntary waiver of his *Miranda* rights when an interested adult is not present. Commonwealth v. A Juvenile, 449 N.E.2d 654, 657 (Mass. 1983). *See also* Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (validity of a waiver depends on particular circumstances of each case "including the background, experience and conduct of the accused").

C. *The Massachusetts Experience*

Massachusetts enacted its original delinquency[159] statutory scheme in 1906.[160] Although it has been amended, certain fundamental principles have remained constant. A child under the age of seven is conclusively presumed incapable of committing a crime.[161] Those aged fourteen and older are presumed cognizant of the wrongfulness of their acts, and may be eligible for adult penalties.[162]

The Massachusetts juvenile court is an adversarial system that procedurally and substantively mirrors the criminal court system. In addition to the right to jury trial, children have the right to bail and discovery.[163] To be considered competent to stand trial, children must have a rational, as well as a factual, understanding of the proceeding, and be able to assist their attorney in the preparation of their defense.[164] Evidentiary hearings on motions to suppress statements, evidence, and identifications are commonplace. Children may raise all defenses otherwise available to adults, such as mistake, duress, self-defense, and lack of criminal responsibility due to mental illness or defect.[165]

The consequences of delinquency adjudications can be severe and lifelong. Despite lingering statutory language that states that proceedings against children "shall not be deemed criminal proceedings,"[166] delinquency adjudications now may be used as predicate convictions for sentencing enhancements in adult proceedings.[167] Prosecutors routinely reference juvenile records in

---

159. In Massachusetts, a delinquent is any child "between [the ages of] seven and seventeen who violates any city ordinance or town by-law or who commits any offence against a law of the commonwealth." MASS. ANN. LAWS ch. 119, § 52 (LexisNexis 2002). If a child is adjudicated delinquent for a violation of the criminal law, he is subject to commitment to the juvenile correctional agency until age eighteen. *Id.* § 58.

160. MASS. ANN. LAWS ch. 413 (LexisNexis 1906) (current version at MASS. ANN. LAWS ch. 19 (LexisNexis 2002 & Supp. 2006). *See* 44 Roderick L. Ireland, *Juvenile Law*, *in* MASSACHUSETTS PRACTICE SERIES § 2 (2d. ed. 2006).

161. *See* MASS. ANN. LAWS ch. 119, § 52 (LexisNexis 2002).

162. *See, e.g., id.* § 54 (prosecutorial discretion to indict children fourteen to seventeen as youthful offenders); *id.* § 58 (youthful offender may be sentenced to such punishment as is provided by law for the offense).

163. *Id.* §§ 55A, 67; MASS. R. CRIM. P. ANN. 14 (Lexis 2005).

164. *See* Commonwealth v. Vailes, 275 N.E.2d 893 (Mass. 1971); Dusky v. United States, 362 U.S. 402 (1960).

165. MASS. ANN. LAWS ch. 123, § 15 (LexisNexis 2002) ("a court of competent jurisdiction" may order an examination of a juvenile when the court doubts whether the juvenile is criminally responsible).

166. MASS. ANN. LAWS ch. 119, § 53.

167. *See, e.g.*, Commonwealth v. Connor C., 738 N.E.2d 731, 738 (Mass. 2000) (finding a delinquency adjudication may be used as a predicate conviction for adult

adult bail hearings and probation officers routinely cite delinquency adjudications in support of more punitive sentencing recommendations for adult offenders. Children adjudicated delinquent for enumerated sex offenses are subject to registration and public disclosure of their identity through the statewide sex offender registry.[168]

In addition, public disclosure follows children into their schools. Schools routinely receive notification of children arraigned or adjudicated delinquent for felonies, and such children are subject to exclusion from school if officials determine that their continued presence would be detrimental to the school community.[169] Once a child has been expelled from one public school, no other school district in the state is obligated to educate that child.[170]

Viewed as a whole, recent Massachusetts jurisprudence has eliminated any substantive differences between delinquency and criminal proceedings. The rights and obligations attendant in the delinquency proceeding are designed to protect the innocent and punish the blameworthy. Under such a framework, it would appear that the infancy defense would be applicable in juvenile court proceedings.

Yet in April 2007, the Supreme Judicial Court of Massachusetts held that the infancy defense was not applicable in *Commonwealth v. Ogden O.*[171] *Ogden* involved a ten-year-old boy charged with mayhem and assault and battery by means of a dangerous weapon.[172] The juvenile sprayed a combustible liquid on a nine-year-old boy and then threw a burning piece of paper on the boy.[173] The boy's pants caught fire, and his burns led to a hospitalization of almost two weeks and several months of treatment.[174]

Ogden serves as yet another example of the legal truism that bad cases make bad law. Unquestionably, this crime was horrific, and the facts of the case might lead many to the initial reaction that the juvenile deserves punishment for his actions. Yet, defense counsel at trial failed to even reference his client's age as a factor in whether he

---

sentencing enhancement pursuant to MASS. ANN. LAWS ch. 269, § 10(d) (LexisNexis 1992 & Supp. 2006); Commonwealth v. Foreman, 830 N.E.2d 219 (Mass. App. Ct. 2005) (finding juvenile's adjudication for armed robbery satisfied predicate conviction requirement for adult sentencing enhancement as armed career criminal pursuant to MASS. ANN. LAWS ch. 269, § 10G (LexisNexis Supp. 2006)).

168. MASS. ANN. LAWS ch. 6, § 178C (LexisNexis 2002 & Supp. 2006).

169. MASS. ANN. LAWS ch. 71, § 37H1/2 (LexisNexis 2002 & Supp. 2006).

170. *See id.*

171. Commonwealth v. Ogden O., 864 N.E.2d 13, 18 (Mass. 2007).

172. *Ogden*, 864 N.E.2d at 15.

173. *Id.*

174. *Id.*

lacked the capacity to form the mens rea required to commit mayhem.[175] The *Ogden* court acknowledged that "the performance of the juvenile's trial attorney may have been underwhelming," while rejecting the claim that the attorney's failings constituted ineffective assistance of counsel.[176]

The court focused exclusively on adult cases in its analysis of the mens rea required for a mayhem conviction.[177] The court assumed that any ten-year old, unless suffering from "developmental handicaps or other disabilities," can adequately perceive the risks of fire[178] to satisfy the mental state required for a conviction of mayhem—"that the assault was intentional, unjustified, and made with the *reasonable appreciation* on the assailant's part that a disabling or disfiguring injury would result."[179] The court failed to offer a serious analysis of how the child's age bears on whether he could have a "reasonable appreciation" of the seriousness of his acts. Instead, the court merely concluded that the boy's actions were not accidental and that therefore "[t]he jury could reasonably believe that the extraordinarily dangerous nature of fire would not be lost on a ten year old boy."[180]

The conclusion that the child's actions were intentional does not suffice to demonstrate that a ten-year old can reasonably appreciate the seriousness of harm resulting from lighting another child on fire. If Massachusetts accepted the infancy defense, the state would have had the burden, as a threshold matter, of overcoming the presumption against the boy's criminal capacity, regardless of whether the juvenile intended to commit the act. Yet, the *Ogden* court rejected the applicability of the infancy defense in Massachusetts, falling back on the *parens patriae* model of the juvenile court system.[181] In a footnote, the court acknowledged recent legislative changes toward a more punitive Massachusetts juvenile justice system, yet failed to incorporate those changes into its analysis of whether the infancy defense should apply.[182]

The court stated that "[w]hile a delinquent child may not have the maturity to appreciate fully the consequences of his wrongful actions . . . that does not mean that a delinquent child lacks the ability to formulate the specific intent to commit particular wrongful

175. *Id.* at 19.

176. *Id.* at 21.

177. *Id.* at 16.

178. *Id.* at 17.

179. *Id.* at 16 (quoting Commonwealth v. Davis, 406 N.E.2d 417 (Mass. App. Ct. 1980) (emphasis added)).

180. *Id.* at 17.

181. *See id.* at 17-18.

182. *Id.* at 18 n.5.

acts."[183] Given the punitive aspects of an adjudication of delinquency, the court's statement violates the principle of penal proportionality.[184] If a child lacks the maturity to appreciate fully the consequences of his actions, then that child should not face punishment for those actions. If an adjudication of juvenile delinquency truly denoted an effort by the state to rehabilitate the child, and nothing more, then the court's reasoning would survive scrutiny. However, the undeniably retributive aspect of an adjudication of delinquency demands that only those capable of understanding the wrongfulness of their acts be subject to delinquency proceedings.

The fact that delinquency adjudications in Massachusetts involve punishment, at least as much as rehabilitation, is demonstrated by the reality of confinement to custody in the Massachusetts Department of Youth Services (DYS). The DYS mission statement references public safety and crime prevention before rehabilitation or treatment of juveniles in DYS care.[185] Commitment to DYS cannot in good faith be described as merely rehabilitative. Juveniles committed to DYS custody are removed from the courtroom in shackles.[186] They are then transported to a secure detention facility until DYS makes a placement determination.[187] Children committed to DYS receive indeterminate sentencing until age eighteen.[188] DYS employs an offense-driven sentencing grid to determine the duration of secure confinement, rather than focusing on the needs of the child.[189] For example, the offense of mayhem[190] (one of the charges in *Ogden*) has a

183. *Id.* at 18.

184. *See supra* note 3 and accompanying text.

185. Massachusetts Department of Youth Services, Mission Statement, http://www.mass.gov/dys (follow "Mission Statement" hyperlink) (last visited Sept. 29, 2007). The Mission Statement states:

> Our mission is to protect the public and prevent crime by promoting positive change in the lives of youth committed to our custody, and by partnering with communities, families, government and provider agencies toward this end. We accomplish this mission through interventions that build knowledge, develop skills and change the behavior of the youth in our care.

Id.

186. *See* Barbara Kaban & Francine Sherman, *An Overview of Disposition Process in Delinquency Cases*, *in* JUVENILE LAW BASICS 205, 209 (1998).

187. *See id.*

188. See MASS. ANN. LAWS ch. 119, § 58 (LexisNexis 2002).

189. *See* R. MARC KANTROWITZ, AMY M. KARP & STEPHEN M. LIMON, 2007 MASSACHUSETTS JUVENILE DELINQUENCY AND CHILD WELFARE LAW SOURCEBOOK & CITATOR, 661-90 (2007).

190. MASS. ANN. LAWS ch. 265, § 14 (LexisNexis 2002 & Supp. 2006).

recommended sentence range of twelve to twenty-four months;[191] disorderly conduct[192] has a recommended range of thirty to 120 days.[193] While the sentencing grid is in theory just a guideline, and is not mandatory nor a part of the regulations or statute,[194] the agency usually follows the sentencing grid.

D. Arguments in Favor of the Application of the Infancy Defense in Delinquency Proceedings—Assessing the Applicability of the Infancy Defense in Your State

The overwhelming majority of states have not resolved the issue of whether the infancy defense applies in juvenile court proceedings.[195] Moreover, as previously noted, many of the judicial decisions holding the defense inapplicable predate the legislative shift in the 1990s away from the *parens patriae* model of the juvenile court. Therefore, attorneys who represent children in delinquency proceedings should be proactive in pushing the issue, by advocating for the applicability of the infancy defense in their states. There are a variety of arguments attorneys may employ to advocate for the availability of the infancy defense in delinquency proceedings. Naturally, attorneys in states with relatively recent court decisions rejecting the applicability of the defense will face a greater challenge than attorneys in states with older decisions relying on outdated reasoning, or those in states in which the issue has not been resolved. This section presents a list of factors that attorneys should consider when arguing for the availability of the defense. Some of these factors apply with equal strength in all jurisdictions, while others will vary in their relevance depending upon the particulars of a given state's juvenile justice system.

- When was the last time the issue was addressed in your state? Have there been legislative or procedural changes since the earlier decision that warrant bringing a new case?

This is among the most important issues to address when deciding whether and how to present an argument for the applicability of the infancy defense. The older the decision holding the defense inapplicable, the more likely the reasoning rested upon a vision of juvenile justice that does not comport with modern reality. This is especially true in those few states where the only relevant precedent predates the Supreme Court's overhaul of the juvenile

191. KANTROWITZ ET AL., *supra* note 189, at 672.

192. MASS. ANN. LAWS ch. 272, § 53 (LexisNexis 2002 & Supp. 2006).

193. KANTROWITZ ET AL., *supra* note 189, at 666.

194. *See id.* at 676.

195. *See* tbl. *supra* Part IV.B.

justice system in the 1960s.[196] Also, remember the canon of statutory construction, which states that repeal of the common law by implication is disfavored in the law.[197] Therefore, in those states without a clear judicial precedent on the issue, the common law infancy defense should survive unless the legislative scheme has clearly abrogated the common law.

- Have the rehabilitative goals of the juvenile court been modified to include individual accountability and/or public safety?

This question goes to the core of the need for the revitalization of the infancy defense. As the *parens patriae* rationale of juvenile justice has been stripped away in most states in favor of a law-and-order rationale modeled on adult criminal courts,[198] only those children mature enough to form criminal intent should face criminal punishment. The more explicit a state has been in its revocation of the *parens patriae* model (for example, by legislative changes to the purpose clause of juvenile justice statutes to emphasize individual accountability, punishment, and public safety over children's welfare), the stronger the need for the infancy defense.

- Is the primary goal of the juvenile correctional agency public safety?

Just as juvenile courts resemble criminal courts in many states, juvenile correctional agencies have grown to resemble adult prisons. Decisions rejecting the infancy defense based upon the *parens patriae* model of juvenile justice are susceptible to challenge if the state's juvenile correctional agency utilizes an offense-based sentencing grid, basing sentencing decisions on the severity of the offense rather than the needs of the child.[199]

- May a finding of delinquency be used against the child for any purpose, e.g., bail hearings, waiver hearings, or as a predicate offense for sentencing enhancement in adult proceedings? Are delinquency adjudications a permanent part of the individual's criminal record?

The more serious and lasting the consequences of a delinquency adjudication, the less tenable is the argument that the juvenile justice system is premised upon a nonadversarial model of intervention by the state on behalf of the child's best interests. This argument has particular strength if an adjudication of delinquency

196. For a discussion of the most important Supreme Court cases regarding the juvenile justice system, see *supra* Part III.B.

197. *See, e.g.*, Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 82 (1984).

198. *See supra* Part III.C.

199. For a discussion of the sentencing grid used in Massachusetts, see *supra* notes 189-194 and accompanying text.

will follow the child into adulthood, as a permanent part of his criminal record. Again, this factor stresses the move toward punishment of juvenile offenders, which can only be justified for those children mature enough in their development to appreciate the wrongfulness of their acts.

- Are there minimum periods of secure confinement required for qualifying delinquency offenses?

Any child facing a delinquency proceeding that will lead to a minimum period of secure confinement deserves the full protection of rights afforded to a criminal defendant. Only if the state can overcome the rebuttable presumption against children's criminal capacity should children be subject to an adjudication of delinquency leading to a mandatory minimum period of confinement.

- Has the confidentiality of the juvenile proceeding been eroded, e.g., open courtrooms, access to juvenile records, school notification, and sex offender registration?

As the consequences of delinquency proceedings become more public and extend to matters ancillary to the offense (such as education), only those children with the requisite maturity to have understood the wrongfulness of the acts in question should face such severe consequences. It is difficult to argue that delinquency proceedings are in the best interest of a child if the proceedings are open to the public, or if the outcome could result in the deprivation of the child's right to a public education.

V. CONCLUSION

The modern juvenile justice system has evolved considerably from the model envisaged by the founders of the juvenile court movement. Most states subject children charged with crimes to quasi-criminal delinquency proceedings with potentially lifelong consequences. Yet, the modern understanding of children has also evolved. There is a growing body of neurological research documenting the anatomical immaturity of children's brains and the corresponding impact on the ability of children to reason and control impulses. There is also an impressive history of psychological research differentiating children's reasoning, judgment, and impulse control from that of adults. There is a disconnect between this burgeoning scientific understanding about child development and the shift toward a more punitive juvenile justice system. States should revitalize the common law infancy defense in juvenile courts, to ensure that only those children mature enough to appreciate the wrongfulness of their actions are subjected to punishment.

The revitalization of the infancy defense in delinquency proceedings will not prevent the state from offering necessary

services to children truly in need of the state's intervention. There are various ways to address the needs of troubled children, rather than a delinquency adjudication that resembles an adult criminal sentence. The state can extend social services, counseling, and even "children in need of services"[200] petitions when appropriate. Yet, as long as the juvenile justice system is oriented more toward punishment than rehabilitation, children deserve a presumption against criminal capacity. When confronted with troubled children, the juvenile justice system should seek rehabilitation and reformation, not retribution. Without the infancy defense, a delinquency proceeding may subject a child who is not culpable to punishment.

200. *See, e.g.*, FLA. STAT. § 984.15 (2007); MASS. ANN. LAWS ch. 119, § 39E (LexisNexis 2002).

***